rules, and indirectly and to a far lesser extent, what might come to remain of the EEO Rule.

After the D.C. Circuit's 1975 decision instructing the Commission to consider the effects of its spectrum management policies on minority ownership,182/ the Commission issued only a handful of decisions that followed the court's lead.183/ Thereafter, the Commission has seldom been at a loss for reasons not to narrow the Analog Divide. When it lacked reasons, it simply disregarded the minority entrepreneurs or civil rights groups' pleadings and said nothing at all. In Docket 80-90,184/ in the

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182/ Garrett, supra.

183/ Atlass Communications, Inc., 61 FCC2d 995 (1976) (granting AM nighttime coverage waiver to promote minority ownership); Hagadone Capital Corp., 42 RR2d 632 (1978) (to promote minority ownership, Hawaiian AM station's nighttime authority petition was removed from the processing line and afforded expedited consideration); Clear Channels, supra, 78 FCC2d at 1368-69 (adding minority ownership as a criterion for acceptance of certain applications for new service on the domestic Class I-A Clear Channels, only to repeal them five years later in Clear Channels Repeal, supra.)

184/ The Commission considered minority needs when it created 689 new FM authorizations in Docket 80-90. Modification of FM Rules, supra, 94 FCC2d at 159 n. 10. However, it refused to dedicate spectrum for minority ownership, preferring instead to rely on the comparative process. Id. at 179. Soon afterward, when it established comparative criteria for the Docket 80-90 stations, the Commission diluted the previously available enhancement for minority ownership by authorizing a "daytimer preference" -- on the startling assumption that operating during daylight hours renders an applicant inherently as likely to promote diversity as minorities. Implementation of Docket 80-90 supra, 101 FCC2d at 647-49. Commissioner Rivera accurately characterized the weight of the daytimer preference -- which incorporated a "substantial" local ownership credit -- as so heavy that "it will be almost impossible for any newcomer - minority or non-minority - to prevail against a qualifying daytimer." Id at 653 (Dissenting Statement of Commissioner Henry M. Rivera). Given the Commission's failure to design Docket 80-90 to promote diversity, it is no wonder that Docket 80-90 is seldom regarded as a great success in promoting minority ownership.

9 kHz proceeding,[185] in the Domestic Clear Channel proceeding,[186] in the Foreign Clear Channel proceeding,[187] in the AM expanded

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185/ 9 kHz Channel Spacing for AM Broadcasting (Report and Order), 88 FCC2d 290, 314-16 (1981) ("9 kHz Spacing") (Commissioners Jones and Fogarty dissenting) (preferring minor cost savings to owners of 10 kHz per channel digital receivers in luxury automobiles to the creation of approximately 400 new AM stations urgently needed by minorities.)

186/ In Clear Channels Repeal, supra, 102 FCC2d at 558, the Commission repealed the minority and noncommercial eligibility criteria in Clear Channels, holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Only thirteen minority owned stations had been created under this two-year old policy. Id. at 555.

187/ Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Report and Order), 101 FCC2d 1, 6 (1985) ("Foreign Clear Channels"), recon. granted in part, 103 FCC2d 532 (1986), reversed in part, NBMC v. FCC, 791 F.2d 1016, 1022-23 (2d Cir. 1986), on remand, Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Further Notice of Proposed Rulemaking), 2 FCC Rcd 4884 (1987), Nighttime Operations on Canadian, Mexican, and Bahamian Clear Channels (Second Report and Order), 3 FCC Rcd 3597, 3599-3600 ¶¶19-23 (1988) ("Foreign Clear Channels Second R&O"), recon. denied, 4 FCC Rcd 5102, 5103-5104 ¶¶16-20 (1989) (eliminating minority eligibility criteria on the Foreign Clears, on the theory that minorities can always apply to occupy other vacant spectrum.) Dissenting in Foreign Clear Channels, supra, 101 FCC2d at 30-31, Commissioner Rivera charged that the Commission was

> backing away from our commitment to encourage minority ownership and noncommercial use of [40 potential new stations] without any record basis for doing so....The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason, the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its motivation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved (emphasis in original, fn. omitted).

band proceeding,[188] in the 1992 Cable Act Implementation proceeding,[189] the Satellite Digital Audio Radio

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188/ In deciding to give all of the expanded band to incumbents and none to minority new entrants, the Commission was quite brazen in articulating its regulatory priorities: "reserving even one channel for [minority, female and educational broadcasters'] exclusive use would assure a 10% decrease in expanded band resources dedicated to interference and congestion reduction." Technical Assignment Criteria for the AM Broadcast Service (Report and Order), 6 FCC Rcd 6273, 6307 ¶111 (1991) ("Expanded Band Report and Order"), recon. granted in part and denied in part, 8 FCC Rcd 3250, 3254 ¶¶36-37 (1993) ("Expanded Band Reconsideration Order") (subsequent history omitted) (permitting only incumbents to colonize the AM expanded band (1605-1705 kHz) and refusing to adopt minority ownership incentives for occupancy of the band, even though minority ownership had been among the primary justifications for the band's expansion in the Commission's planning for the 1979 WARC and the U.S. delegation's advocacy presented at the WARC, where the band was authorized.) The Expanded Band Report and Order failed to acknowledge the existence of, much less respond to, the extensive comments of the NAACP, LULAC and the National Black Media Coalition on this issue; the organizations weren't even listed in the Appendix as commenters. Id. at 6344-47. When the organizations sought reconsideration, advancing a less sweeping proposal, the Commission held that the new proposal "should have been submitted earlier as a comment in response to the NPRM" -- that is, as part of the same initial comments the Commission had disregarded! Adding insult to this injury, the Commission went on to justify its refusal to adopt minority incentives by claiming that it had "address[ed] the need to increase opportunities for minority ownership" when it adopted Revision of Radio Rules and Policies, 7 FCC Rcd 6387 (1992) ("1992 Radio Rules - Reconsideration"). Expanded Band Reconsideration Order, supra, 8 FCC Rcd at 3261 ¶37. Actually, 1992 Radio Rules - Reconsideration was the decision that affirmed the Commission's preference for additional consolidation of radio ownership in spite of minority groups' (accurate) prediction that more consolidation would severely inhibit minority ownership.

189 Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (First Report and Order), 8 FCC Rcd 3359 (1993) (failing even to acknowledge the existence of extensive comments by the Caribbean Satellite Network ("CSN"), much less CSN's arguments for (or any other discussion of) policies to foster minority ownership of cable networks. CSN, which had 1,500,000 subscribers, was the only minority-owned cable channel, besides BET, that had ever launched U.S. operations.)

proceeding[190] and the digital audio proceeding,[191] the Commission refused to take steps to bridge the divide between White ownership and minority ownership while prematurely repealing modest remedial measures. The Commission behaved as though Garrett never happened.

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190 Responding to Rules and Policies for the Digital Audio Radio Satellite Service (Notice of Proposed Rulemaking), 11 FCC Rcd 1 (1995), MMTC urged the Commission to set aside channels to provide access to minority entrepreneurs. Comments of MMTC in IB Docket No. 95-91 and GEN Docket No. 90-357 (filed September 15, 1995). The Commission refused, holding that it had "relied on the representations of [the four] satellite DARS applicants that they will provide audio programming to audiences that may be unserved or underserved by currently available audio programming." Rules and Policies for the Digital Audio Radio Satellite Service (Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking), 12 FCC Rcd 5754, 5791 ¶90 (1997). Thus, nonminority entrepreneurs' promise that they will offer minority-oriented formats trumped minority entrepreneurs' own proven record of diverse programming. This paternalistic holding was a radical departure from the Commission's historic commitment to minority ownership as a means of advancing diversity. (Fortunately, and to their credit, XM and Sirius kept their promises. See p. 40 n. 74 supra.)

191/ Minority ownership was nowhere mentioned in Establishment and Regulation of New Digital Audio Radio Services (Notice of Inquiry), 5 FCC Rcd 5237 (1990) ("DARS NOI"), even though the Notice focused on providing spectrum for incumbents and for public broadcasters and inquired into the need for structural ownership restrictions. Id. at 5238 ¶11 and 5239 ¶14. Responding to the DARS NOI, four national civil rights organizations filed extensive comments and reply comments, along with an extensive study detailing the level of minority demand for DAB facilities by market. Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed October 12, 1990); Reply Comments of the NAACP, LULAC, National Hispanic Media Coalition and National Black Media Coalition in GEN Docket No. 90-357 (filed January 7, 1991). The Commission neglected to mention, much less rule on the civil rights organizations' proposals or their demand study, or put the minority ownership issue out for comment in subsequent DAB proceedings. Establishment and Regulation of New Digital Audio Radio Services (Notice of Proposed Rulemaking and Further Notice of Inquiry), 7 FCC Rcd 7776 (1992) ("DAB NPRM"). The DAB NPRM said nothing about minority ownership.

e. The Commission Failed To Prevent Employment Discrimination

The Commission also failed to thoroughly and reliably implement regulations intended to prevent discrimination. In 1969, the Commission adopted a rule barring discrimination by its licensees and requiring them, inter alia, to recruit minorities.192/ But in the 29 years during which the rule was in effect, the Commission barely enforced it. Only fourteen stations ever went to hearing on allegations of discrimination, and not one ever lost a license for race or gender discrimination. As MMTC and others have extensively documented, enforcement of the EEO rule was spotty at best.193/

192/ Nondiscrimination in the Employment Practices of Broadcast Licensees, 18 FCC2d 240 (1969) (adopting 47 C.F.R. §73.2080) ("Nondiscrimination - 1969").

193/ This history is summarized in the Comments of Civil Rights Organizations in MM Docket Nos. 96-16 and 98-204 (Broadcast and Cable EEO), filed March 5, 1999, at 114-116 (available from undersigned counsel on request). See also Market Entry Barriers, p. 100, quoting Rev. Everett Parker, Treasurer of MMTC and founder of the Office of Communication of the United Church of Christ ("UCC"):

> [With] the first EEO rules, when EEO reports were turned in, the FCC didn't even open them. They threw them into boxes and took them into the library and stored them...They never [] examined [radio and television] stations in detail for their [EEO] performance even though they are supposed to. And you know, license renewal has always been a farce....the staff at the FCC certainly did not want to be bothered with these hundreds and hundreds of reports and analysis....
>
> In the end, since [UCC was] issuing [EEO] analyses every year we made a deal with the then chairman...(H)e and I made an agreement that [we] would do the analysis and would have the figures. And as long as he was Chair everything was just wonderful.

(n. 193 continued on p. 100)

This history establishes five key points.

First, the Commission was an active co-conspirator with state governments in two kinds of schemes to prevent minorities from enjoying broadcast education. The FCC awarded broadcast licenses to segregated institutions, and failed to enaensure that ostensibly "separate but equal" minority state institutions would secure broadcast licenses. Even today, the Commission does not ensure that states operating dual systems of higher education, designed primarily for Whites and African Americans respectively, are apportioning facilities and opportunities equally throughout the institutions they administer.

Second, the Commission routinely granted and renewed licenses of commercial broadcasters that discriminated, and in doing so openly embraced state segregation laws a year after Brown. It continued these policies into the 1970s, thereafter adopting but rarely enforcing a rule to prevent employment discrimination.

193/ (continued from p. 99)

> But then, of course, the Reagan FCC came along and after that, you know, they just said they weren't going to enforce the EEO rules and the hiring and promoting of minorities and women went down again....

Henry Rivera, Chair of MMTC and a commissioner from 1981 to 1985, added that during his term on the FCC "one of the things that happened that hurt a lot was the Commission's decision basically to stop enforcing its EEO policies... [the then Chairman] thought that this was a bad thing to do, that it was not appropriate for the government to be sticking its nose in enforcing broadcasters to hire minorities...That hurt a lot because [minority and women employees] are your farm team, basically. These are the folks that you look to in the future to get into ownership.... Id. at 100-101.

Third, although it knew that the exclusion of minorities from broadcast education denied minorities an opportunity to obtain broadcast experience or a past broadcast record, the Commission built these criteria into its comparative licensing policies anyway. The Commission did not repeal a related, overbroad financing rule until 1981. Thereafter, the Commission continued to award licenses for construction permits through a system designed to replicate and reinforce the effects of past discrimination against minorities, and to subsidize and reward those who secured their broadcast experience and operating records during the period when minorities were excluded.

Fourth, the Commission repeatedly refused to take steps to correct minorities' poor access to high quality technical facilities, even though the Commission's own misbehavior was a proximate cause of this poor allocation of facilities.

Fifth, the Commission failed to enforce regulations designed in a small way to prevent discrimination.

Since the Commission's misconduct in broadcast regulation -- financed by the taxpayers -- have deeply affected constitutionally protected rights, remedial steps are justified.[194/] Remediation of government-assisted discrimination is a compelling government

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194/ Croson, supra, 488 U.S. at 492.

interest.[195] That interest is particularly compelling in light of the central role of the electronic mass media in maintaining social cohesion[196] and cultural vibrancy,[197] and indeed in sustaining

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195/ See discussion at pp. 71-72 supra.

196/ The socially unifying nature of mass communications was recognized in Waters Broadcasting Corp., 91 FCC2d 1260 (1982) ("Waters"), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984). In Waters, the Commission awarded a decisionally significant minority enhancement to the ownership integration proposal of an African American woman who proposed to serve a nearly all-White community. The Commission held that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." Id. at 1265. Thus, Waters validated the fact that communication between minorities and nonminorities, rather than just communication within a minority group, is an essential aspect of the diversity-promoting goal of the comparative hearing process. See also Dr. Martin Luther King Movement v. Chicago, 419 F.Supp. 667 (N.D. Ill. 1976) (emphasizing that African Americans' need for access to a White audience requires a municipality to permit a civil rights march in a White neighborhood).

197/ It is essential that cultural content be included with the scope of equal protection and due process in the media. Although the Commission's diversity jurisprudence has focused largely on informational, public affairs and instructional content, (see, e.g., NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) and Deregulation of Radio, supra, 84 FCC2d at 975) it is cultural broadcast content which most influences and mediates social norms. The inclusion of culture among the elements of media content affecting due process or equal protection rights may be analogized to the inclusion of cultural (as well as athletic) activities in the scope of educational opportunities covered by desegregation decrees. Brown I held that education is "a principal instrument in awakening the child to cultural values." Id., 347 U.S. at 493. Courts have not wavered in requiring the integration of school bands and orchestras, sporting events and extracurricular clubs. See, e.g., Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690, 696 (5th Cir. 1968) (declaring that failure to schedule games between all-Black teams against all-White teams "is no longer tolerable; the integration of activities must be complete.") Similarly, the Commission should not waver in including culture within the scope of content triggering due process or equal protection rights in the media.

our democracy itself.[198] Remediation of discrimination in the media is at least as important as remediation in public education -- a field in which the compelling nature of the government's interest is settled law.[199] As the Commission acknowledged when

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198/ Nobody seriously contends that the nation as we know it could survive long without free, over-the-air broadcasting. Over-the-air broadcasting, including both television and radio network, local and syndicated programming, has by far the greatest impact upon our society's educational, cultural and political development when compared to all other media outlets, because most people rely upon such programming as their primary source for information and entertainment. In fact, our system of product and service marketing, and our culture, are entirely dependent upon it. More important, our political system depends on it: Section 315 of the Communications Act presumes the existence of free broadcasting as a critical component of the democratic system. Red Lion, supra, 395 U.S. at 389. Thus, when the federal government was shut down in January, 1996, leaving only "essential" (e.g. National Security) employees on the job, the Mass Media Bureau was expected to maintain a skeleton staff to ensure that the nation's broadcasting infrastructure would continue to operate.

199/ The media, like education, is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one's civil liberties, and informed participation in the political process. See Blue Book, supra, at 4. What school desegregation jurisprudence tells us about the importance of public education can also be said about free broadcast media today. Public education has traditionally been recognized as vital to the "preservation of a democratic system of government." Brown I, supra, 347 U.S. at 493; see Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). Further, public education is necessary to prepare individuals to be self-reliant and self-sufficient participants in society. Brown I, supra, 347 U.S. at 493.

it initially adopted the EEO Rule, "it has been argued that because of the relationship between the government and broadcasting stations, 'the Commission has a constitutional duty to assure equal employment opportunity.'"200/ No less can be said about media ownership. The Commission and the Courts have recognized -- sporadically but clearly -- that the Commission has authority to take remedial steps in the exercise of its spectrum management and licensing authority.201/ Consequently, in this proceeding, the Commission should accept the duty of aggressively bringing about the racial integration of broadcast ownership.

200/ Nondiscrimination - 1969, supra, 18 FCC2d at 241. The Commission identified Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Burton") as a citation which had been given in support of that proposition. Id. at n. 2. The party that made this argument in 1969 was the Department of Justice. Citing Burton, the Department argued that "the use of the public domain would appear to confer upon broadcast licensees enough of a 'public' character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discrimination on the grounds of race, color, or national origin." Letter to Hon. Rosel Hyde from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, May 21, 1968, found in Petition for Rulemaking to Request Licensees to Show Non-Discrimination in Their Employment Practices, 13 FCC2d 766, 776 (1968). The Department was absolutely correct. Indeed, the case for federal enforcement of due process or equal protection rights in broadcasting is even stronger than the case for enforcement of those rights in Burton. Burton involved a luncheonette which (owing to its location in a municipal building) could not have existed absent state action, but which was not essential to the performance of the state's functions. Free broadcasting cannot exist absent state action, and it is essential to the performance of the state's functions.

201/ See Garrett, supra, and discussion herein at pp. 64-65 supra.

3. Minority Ownership Policies Promote Economic Competition

Regulation to promote economic competition could satisfy strict scrutiny. Minorities are often unable to compete effectively for reasons other than (or in addition to) the present effects of the government's own past involvement in discrimination. When a significant group is unable effectively to contribute its competitive acumen to the marketplace, the public may suffer by being denied the full range of products and services that the marketplace otherwise would provide.

Economic competition as a compelling interest justifying race-conscious programs is such a new concept that no reported FCC decision discusses this issue. Yet the impact of racial exclusion on competitiveness was well established by DOD's pioneering and highly successful work in promoting racial inclusiveness.202/ Developing the law and economics on this subject would be a worthy undertaking for the Commission.

In any industry, the irrational exclusion of any input to production distorts the marketplace, reduces the quantity and quality of outputs, drives up prices and leaves consumer demand unsatisfied. In the electronic media, a key input into production is the quality and diversity of the ownership pool, consisting of the companies whose management teams, business plans, talent and creativity are the basis for organizing and deploying all other

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202/ The Army's aggressive efforts to stay competitive by ending segregation and ensuring full integration at all levels is described in Charles C. Moskos and John Sibley Butler, All That We Can Be (1996).

inputs to production. The diversity of the ownership pool is an especially critical input in the radio industry, for which business creativity so often translates into ability to attract creative people to the line staff and manage them effectively. In a business whose product is the distribution of the fruits of talent, it is unsound economic policy to allow market imperfections to exclude or drive out anyone on a basis other than merit.203/

As we have shown, minorities control only a miniscule proportion of radio stations and industry asset value. Minority participation has been depressed by government action and inaction, as well as by societal discrimination. But whatever its causes, the resulting nonparticipation of minorities in ownership is inefficient as a means of organizing production in a business uniquely based on talent. Since talent is equally distributed throughout society, the nonparticipation of large sectors of society in the generation of production of the fruits of talent is inherently inefficient. Whether or not it is anticompetitive, it is macroscopically noncompetitive.

203/ An argument can be made that this principle applies in industries like radio and television, journalism, movies, music, sports, medicine, education and law, each of which depend heavily on human talent -- but not necessarily in industries whose primary inputs in production are natural resources such as electricity. For example, in NAACP v. FPC, supra, the NAACP had asked the Court to find that EEO rules in the power industry would make that industry more competitive. The Court found the argument intriguing but the Court found that the facts did not demonstrate a nexus between minority employment and electric power generation sufficient to require the FPC to adopt an EEO rule similar to that in effect at the FCC. In dictum, the Court declared that the FCC's mandate to promote diversity justified its EEO regulations. Id., 425 U.S. at 670 n. 7. The Court left open the question of whether the FCC's EEO rule could have been justified as a means of promoting the competitiveness of the broadcasting industry.

Greater minority inclusion would strengthen the competitiveness of the radio industry in three ways. First, by enabling the minority owned segment of the industry to compete effectively in radio ownership, the Commission would bring about an increase in the number of radio stations which are operating successfully, staying on the air, and serving the public serving the public. Second, minority owned facilities would create jobs which would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace. Third, new facilities owned by minorities and reaching heretofore underserved minority audiences have a net positive effect on the ability of advertisers to reach the entire public.

The Commission would serve itself well by engaging an economic consultant to develop the rigorous analysis needed to sustain a narrowly-tailored initiative to promote competition by fostering minority ownership.

4. Minority Ownership Policies Foster Viewpoint And Source Diversity

By promoting diversity of ownership, including racial ownership diversity, the Commission has sought to promote the broadcast of a diversity of opinions and information. In 1990, the Commission's interest in promoting diversity won the endorsement of five Supreme Court justices. The Court, in Metro Broadcasting, upheld two race conscious minority ownership incentive programs on the basis that these programs helped promote the broadcast of

diverse viewpoints.[204] However, it is uncertain whether today's Supreme Court would find this interest to be compelling, inasmuch as Metro Broadcasting was decided under the intermediate scrutiny standard five years before Adarand III established strict scrutiny as the standard for race conscious federal programs.[205] It is noteworthy, that in the broadcast employment context, a panel of the D.C. Circuit of the U.S. Court of Appeals, in dictum, has expressed its view that promoting broadcast diversity does not constitute a compelling governmental interest, but also suggested suggested that the FCC might be justified in promoting "inter-station" diversity", that is, a variety of different types of stations, including minority owned stations that might be more likely to be programmed for minorities.[206]

204/ Metro Broadcasting, supra, 497 U.S. at 547. The two programs were (1) an enhancement for minority ownership in comparative hearings for broadcast licenses (see TV 9, supra) and (2) the distress sale policy, which provided financial incentives for the transfer of broadcast licenses, in hearing status, to minority owned firms (see 1978 Minority Ownership Policy Statement, supra). The Commission no longer conducts comparative hearings, and the distress sale policy has been used only twice since 1990.

205/ It is not clear that the diversity rationale would fail strict scrutiny. Adarand III only overruled Metro Broadcasting to the extent that it applied intermediate rather than strict scrutiny. See Adarand III, supra, 515 U.S. at 227.

206/ Lutheran Church, supra, 141 F.3d at 355 ("[i]t is at least understandable why the Commission would seek station to station differences[.]")

The Commission has long recognized that minority ownership is a valuable way to foster diversity of viewpoints.[207] The Courts[208] and Congress agree.[209] Extensive empirical

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207/ In 1960, the Commission first recognized that "service to minority groups" serves the public interest. 1960 Programming Statement, supra. The Commission has often recognized racial ownership diversity as a public good. See, e.g., Waters, supra, 91 FCC2d at 1264-1265 ¶¶8-9 (recognizing that a minority broadcaster could provide nonminorities with minority viewpoints they are unlikely to receive elsewhere.)

208/ Justice Brennan's majority opinion in Metro Broadcasting, supra, 497 U.S. at 580-82, concluded:

> [e]vidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoints, especially on matters of particular concern to minorities...minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.

209/ In 1982, Congress determined that "an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities...it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." Communications Amendments Act of 1982 -- National Telecommunications and Information Administration, Pub. L. No. 97-259, H.R. Conf. Rep. 97-765 (1982) at 26. In 1993, Congress adopted 47 U.S.C. §309(i)(A)(3), which provided that

> for each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall include safeguards to protect the public interest in use of the spectrum by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including...businesses owned by members of minority groups, and women.

In 1997, when Congress repealed 47 U.S.C. §309(i)(A)(3) in favor of auctions, Congress again reiterated that minority ownership was an important objective in fostering minority telecom ownership. See 47 U.S.C. §309(j)(3)(B) (competitive bidding must result in dissemination of licenses among a wide variety of applicants including small businesses and businesses owned by minorities and women); 47 U.S.C. §309(j)(4)(c)(ii) (same with respect to assigning areas and bandwidths); 47 U.S.C. §309(j)(4)(i) (provision of spectrum based services).

research,[210] including research sponsored by the Commission,[211] documents that minority owned broadcasters offer viewpoints not provided elsewhere. The viewpoints of minorities -- including the diversity of views held within minority communities -- can enrich public discourse, reduce stereotyping and unify the nation.

210/ These studies are collected in Comments of Consumers Union et al. in Cross-Ownership of Broadcast Stations and Newspapers (MM Docket No. 01-235 (Cross-Ownership of Broadcast Station and Newspapers) (filed December 3, 2001) at 53-54 ns. 87-89 (incorporated by reference). Additional studies are collected in the Comments of EEO Supporters (MMTC et al.) in MM Docket No. 98-204 (Broadcast and Cable Equal Employment Opportunity Rules and Policies) (filed March 5, 1999) at 166-171 (incorporated by reference).

211/ See Diversity of Programming, supra (finding that minority owned radio stations aired more racially diverse programming than did majority owned stations.)

V. A New Regulatory Paradigm: How The Commission Can Promote Source Diversity, Format Diversity, Viewpoint Diversity, Competition, Economic Efficiency And Minority Ownership Simultaneously

A. A Summary Of The Free Speech Radio Concept: How Channel Bifurcation Can Allow New Entrants And Platform Owners Both To Achieve Their Public Interest Objectives 212/

Traditionally, the debate over radio ownership limits has been between those favoring economic efficiency and those favoring diversity of content and ownership. Efficiency proponents favor unfettered consolidation; diversity proponents favor a halt to consolidation. This entirely predictable debate always produces rules that are more politically than empirically justified. Inevitably, these rules are inherently subjective and thus are difficult to defend in court.

To break this cycle of zero sum debate and arbitrary decisions that satisfy no one, we should stop asking "how many stations are

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212/ Our concept has its roots in the writings and musings of former FCC General Counsel and NTIA Director Henry Geller, George Washington University law Dean Jerome Barron, and Aspen Institute scholar Charles Firestone in the early 1970s. These thinkers, with contributions from Albert Kramer, Nolan Bowie, Frank Lloyd, Lew Paper, Andrew Schwartzman and others, developed the idea that public access to the mass media should be regarded as a First Amendment right and might be a more attractive or at least an alternative paradigm for regulation than direct oversight of content through means such as the Fairness Doctrine. The courts were unsympathetic, having refused to recognize access to broadcasting as a First Amendment right. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) and Smothers v. CBS, 351 F.Supp. 622 (C.D.CA. 1972); cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (print media). Nonetheless, we owe the thinkers who gave us the short-lived public access movement a profound intellectual debt. Our Free Speech Radio Concept begins where the public access movement left off: it would make station ownership the vehicle for access, and it would incentivize -- rather than force -- incumbent licensees to create these new ownership -- and thus access -- opportunities.

enough for one company" and instead ask: how can we achieve each legitimate communications policy objective at the same time?

MMTC sets out in this section just such a new paradigm, which will deliver value to each stakeholder in the radio industry -- platform owners, large and small broadcasters, religious and secular broadcasters, minority and nonminority broadcasters, and the listening public. It is not a "compromise." Instead, it is a new paradigm which uses Section 202(b)(2) of the Act to promote source diversity, format diversity, viewpoint diversity, competition, economic efficiency and minority ownership simultaneously.

We begin with the premise that at this time in our history, participation in the stream of communications must be deemed a fundamental right. A person cannot function in society anymore without access to information delivered over the radio. For most Americans, that means access to radio. Radio continues to be the most widely available, cost-effective mass medium.

In today's social and economic climate, the "larger and more effective use of radio in the public interest," 47 U.S.C. §303(g), is imperative and not a discretionary option.

Although our system of radio broadcasting surpasses any in the world, it is based on a piecemeal and outdated regulatory system:

1. It places decisionmaking authority over the dissemination of viewpoints in the hands of relatively few speakers.

2. It is profoundly underutilized for the transmission of news, public affairs, and many types of religious and secular expression.

3. It restricts the economic competitiveness of radio vis-a-vis other mass media.

4. It denies most new entrants an opportunity for access and ownership, thereby placing pressure on the Commission to crowd more low-power stations into the spectrum available for broadcasting.

5. It fails to remedy the consequences of the very long history of discrimination against minorities in ownership, and it has failed to prevent further discrimination.

6. It imposes prohibitive entry costs on religious broadcasters, who for the most part cannot observe marketplace conventions.

7. It fails to provide meaningful access for noncommercial speakers, none of whom is permitted to observe marketplace conventions.

8. It fails to maximize variety, also known as format diversity.

9. Finally, it imposes heavy regulatory costs and burdens on the Commission itself.

These deficiencies persist because radio regulation is premised on the invalid assumption that radio stations will serve the community's needs voluntarily. That dream has proven illusory after Deregulation of Radio.[213/] Voluntary public service in today's radio industry is limited because counterprogramming, in response to a competitor's duplication of one's format, often must result in the elimination of public service programming. Public service programming requires the expenditure of sunk costs over time. Thus, if a competitor duplicates one's format and forces one's station to be re-programmed, the costs that had been sunk into the public service programming must be written off. We refer to this phenomenon as the "Format Imperative."

Viewpoint diversity would logically be advanced by ownership diversity, but as noted earlier, few viewpoints are actually

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213/ 84 FCC2d at 968.

expressed over most radio stations anymore.[214] Attempts to diversify ownership are likely to diversify the content of what little speech we hear,[215] but ownership diversification can have only a very limited effect on the radio listening environment unless it results in the creation of a new programming marketplace that incentives speakers to actually engage in speech. That means that the Commission must regulate around the Format Imperative.

The Commission has few tools to promote viewpoint diversity:

- LPFM was a well intentioned symbol of free speech -- and we were proud to endorse it -- but LPFM will have limited practical usefulness. Even if third adjacents were not protected, LPFM still would not be heard in most communities or in most neighborhoods.

- Attempts to bring back indirect content regulation through ascertainment and program percentage guidelines would be doomed. They would inevitably pit government power against the marketplace, resulting in grudging, minimalistic public service offerings, such as a Sunday morning block of inexpensively produced, unattractive offerings.

214/ To some extent, ownership consolidation has also diminished the number of providers of news and public affairs being heard over the radio. See pp. 13-19 supra. As noted above, owing to the Format Imperative, few stations have much incentive to produce nonentertainment programs irrespective of whether they have the resources to do so. Recall that local public affairs programming began to disappear with the (approximately) 1960-1975 transformation of radio into specialized formats, and most of what was left disappeared after radio programming was deregulated in 1981. By 1996, when radio ownership structure was substantially deregulated, there was little nonentertainment programming left. The Format Imperative may be a more significant determinant of viewpoint diversity in radio than ownership consolidation.

215/ The best current effort to diversify broadcast speech is the EEO Rule, which tends at least to ensure that what little speech we hear embeds a variety of viewpoints. Nonetheless, the power of EEO regulation to promote speech diversity is constrained by the powerful format-driven disincentives to broadcast any material quantum of viewpoint-based speech.

- The opposite approach -- complete programming deregulation -- would also fail because there is so little program regulation left to deregulate. The public would hardly notice the loss of the issues/programs list, whose retention perhaps serves the worthy purpose of immunizing the industry from having to pay spectrum fees, while accomplishing little else.

- Structural re-regulation -- that is, requiring superduopolies to divest their properties -- could be financially and operationally disruptive and could be unfair. Grandfathering would be racially regressive. 216/

- Structural deregulation would have some impact on format diversity (more hybrids but probably few new niche formats. 217/ However, raw structural deregulation cannot increase viewpoint diversity because it cannot change the Format Imperative that creates a disincentive for broadcasters to invest in nonentertainment programming. Indeed, by forcing out independent voices, raw structural deregulation would almost surely decimate viewpoint diversity.

Spectrum managers have only eight variables to manipulate: frequency, longitude, latitude, altitude, bandwidth, selectivity, power and time. Manipulation of the first seven would yield no appreciable increase in the number of allotments, and thus could do little to expand or diversify the speech we hear over the radio. Not much can be wrung out of the spectrum by manipulating station frequencies and geographic location, there being only so many move-ins the spectrum can bear. Bandwidth and selectivity cannot be manipulated until a new generation of receivers becomes available. Even then it would be politically difficult, as the 9 kHz Spacing debacle demonstrated. Station power levels are being manipulated somewhat through LPFM, but, as noted above, LPFM's influence will be limited or nonexistent in most markets.

216/ See p. 46 supra.

217/ See Platform Size and Program Formats, supra, at 21-22.

That leaves the number of hours in the broadcast day as the only variable the Commission can use to promote viewpoint diversity. While the Commission cannot rewrite the Gregorian Calendar, it can split the atom known as the broadcast day, with surprisingly positive results.

As noted above, the Format Imperative creates the primary disincentive to produce quality or quantity nonentertainment programming. Except for a licensee that chooses a news/talk format, broadcasters with access to all 168 hours per week are unlikely to offer much nonentertainment programming. However, a licensee does not actually need "ownership"[218/] of all 168 hours to provide a competitive channel of entertainment.[219/]

Likewise, one desiring to provide nonentertainment programming does not need 168 hours a week in which to do so. Indeed, one does not need anything close to that number of hours. While most people can relax (and listen to music) for hours on end, few people can summon, for long consecutive periods of time, the level of attentive concentration required to contemplate an idea. For example, at least two millennia of experience shows that a religious service of two or three hours can inspire genuine

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218/ We use the term "ownership" of hours here in its economic sense rather than its regulatory sense. As shown infra, adjustments in hours of operation of two stations operating symbiotically on the same frequency would be premised on the existence of a very modest "market" in which a few of the broadcast hours available in a week could be sold by one of these stations to the other one, subject to Commission approval.

219/ For example, many cable channels do just fine with 120 hour per week schedules of entertainment and 48 hours per week of infomercials. See discussion at p. 126 infra.

spiritual devotion. An academic class seldom lasts more than two hours; perhaps that time span marks the limit of most people's ability to absorb knowledge efficiently. Only a few activities, such as jury duty or presiding over an FCC hearing, require a person to engage in concentrated, attentive thought for more than a few hours at a time -- and those activities are often perceived as punishment. The length of time that has proven most suitable for thoughtful contemplation of ideas in the television medium has proven to be sixty minutes.

An entertainment provider could do its job very well with (e.g.) 148 hours per week at its disposal, and a viewpoint provider (that is, one engaged in offering "free speech") could do its job very well with (e.g.) twenty hours per week at its disposal, which leads directly to this proposal:

> **The Commission would create a new class of "Free Speech Stations" having at least 20 non-nighttime hours per week of airtime, independently owned by a small disadvantaged businesses, and primarily devoted to nonentertainment programming. A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station." A platform owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could then buy another fulltime station under the provision of the Communications Act that allows for an exception to the eight station rule when a new station is created (47 U.S.C. §202(b)(2)). That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a platform could grow steadily up to the limits allowed by competition analysis. Moreover, the number of voices and viewpoints heard by the public would grow exponentially, and minority ownership would get a much-needed boost. No new legislation would be required to accomplish all of this.**

Here are the highlights:

1. Creation of New Classification: "Free Speech Station".

A 168 hour per week "Traditional" Broadcaster/Station/Licensee would have the option of applying to the Commission to bifurcate certain channels. The Traditional Broadcaster making a "Bifurcation Election" would become an "Entertainment" Broadcaster/Station/Licensee, operating for no more than 148 hours per week (approximately 88%) of the airtime. The second licensee on that channel, operating with at least 20 hours per week such that no fewer than 20 hours falls between 6 AM and midnight, would be a "Free Speech" Broadcaster/Station/Licensee.220/

220/ The numbers 148 and 20 are not cast in stone, and different numbers would need to apply to AM daytimers. See pp. 174-76 infra (suggesting that this kind of detail could best be resolved through a negotiated rulemaking.) Logical time blocs for a Free Speech Station could be 8-11 PM each evening all week, or 2 PM to midnight Saturday and Sunday. It is, however, essential that Free Speech Stations be assured at least 20 hours of operation during hours other than midnight to 6 AM. As the Commission has recognized, "[i]t would be difficult for us to conclude...that a licensee had acted reasonably if it had offered all of its issue oriented programming at times when it could not have been reasonably anticipated to be effective." Deregulation of Radio (Reconsideration), 87 FCC2d at 816 ¶42; see 47 C.F.R. §73.1740(a)(1) (the Commission does not count nighttime hours of operation in determining an AM or FM station's minimum operating hours.)

It is also essential that bifurcated hours be held to the same schedule from one week to another, to ensure that the Free Speech Stations build audience. For example, the Commission should not permit licensees to bifurcate channels just for the month of January. Radio is a week to week business, and community needs must be met on a year-round basis. See Deregulation of Radio (Reconsideration), 87 FCC2d at 820-21 ¶54 ("[w]hile we would not require the identical amount of issue responsive programming each week, we do not believe that relegating all such programming to a few months, to a few weeks, or even to a few days in an annual nonentertainment programming 'blitz' would be in the public interest...to allow otherwise would undercut the idea of a marketplace of ideas among the aggregate of stations[.]")

2. Ownership Limitations for Free Speech Stations.

A Free Speech Licensee could be commercial or noncommercial. Under a "one to a customer" rule, it could hold only one license per market, and could not be owned by a Traditional or Entertainment Station in the same market. It could not be operated in an LMA, although JSAs would be permitted. Diversity-promoting ownership incubators would be encouraged, as would logical efforts to conserve expenses such as sharing transmitter facilities. There would be no national ownership cap for Free Speech Licensees.

3. Programming Requirements for Free Speech Stations.

A Free Speech Licensee would be expected to devote at least half of its non-nighttime airtime to nonentertainment programming: news, public affairs, religious programming or public service. If necessary, the licensee could use the rest of its airtime to subsidize its nonentertainment programming.221/

4. Programming Requirements for Entertainment Stations.

An Entertainment License could broadcast almost anything it chooses, including almost entirely music or advertising. It

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221/ This approach is similar to that used in Canada for stations it designates as "ethnic" facilities. Under CRTC's regulations, ethnic stations are required to "devote at least half of their schedules to programming in third languages, that is, in languages other than French, English or an Aboriginal language. This will ensure that the Canadian broadcasting system reflects Canada's linguistic diversity." Ethnic Broadcasting Policy, CRTC P.N. 1999-117 (July 16, 1999) at 1. Moreover, an ethnic station may "establish a business model under which 40% of its schedule may be non-ethnic programming order to generate revenues required to support its ethnic programming....it is noteworthy that two ethnic radio stations have [] adopted such a format, using religious programming to subsidize ethnic programming." Id at 3 ¶17.

would have a bedrock obligation to serve community needs, but would have no issues/programs list or specific issue-responsive programming obligations, or other nonengineering obligations apart from EEO, Section 315 and the indecency rules.

5. Removing Market Entry Barriers.

To help remedy the consequences of discrimination, prevent discrimination, promote competition and promote diversity in the most narrowly-tailored way, eligibility to be a Free Speech Licensee would initially be governed by an "early eligibility" procedure, modelled to some extent like the procedure used in Clear Channels. This procedure would give small disadvantaged businesses ("SDBs"), including but not limited to most minority broadcasters, the initial eligilbity to become Free Speech Licensees on bifurcated channels. However (unlike in Clear Channels), if no qualified SDB were interested in being a Free Speech Licensee, other entities would then be eligible.

6. Growth Opportunity For Traditional Broadcasters.

For each of its existing channels bifurcated, the Traditional Broadcaster could secure an additional AM or FM channel, which it would also be expected to bifurcate.222/ In this

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222/ Since each Entertainment Station added to a platform would spawn a Free Speech Station with the same engineering attributes, there would be little reason to restrict whether additional stations acquired by the platform owner are AMs or FMs. For example, suppose a platform owner starts with five FMs and three AMs. It bifurcates all three AMs and an FM, then it acquires four more FMs, each of which it is also required to bifurcate. At the end of the day, the platform would consist of twelve stations: four Traditional (168 hour per week) FMs, five Entertainment (148 hour per week) FMs, and three Entertainment (148 hour per week) AMs. These would spawn three AM and five FM Free Speech

(n. 222 continued on p. 121)

way, each Bifurcation Election would expand a platform of Traditional and Entertainment Stations by one, while yielding two new radio stations.223/ This "bifurcate, then buy and bifurcate" procedure is essential to producing a net gain in viewpoint diversity, since otherwise a Traditional Broadcaster could take out a fulltime voice through purchase and replace it with a parttime one. Under our concept, in each transaction viewpoint diversity essentially takes one step back and two steps forward.

7. Antitrust Limitations.

The number of Traditional and Entertainment Stations comprising a platform would be governed by Section 202(b)(2)'s "new station" exception to Section 202(b)(1).224/ Thus, the ceiling for platform size would be governed by antitrust or public interest

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222/ (continued from p. 120)

Stations, each independently owned -- representing a huge net increase in viewpoint diversity and other public interest benefits. Restrictions on bifurcating AMs to buy FMs would be needed, however, if our concept were modified to allow a Traditional Broadcaster to bifurcate two of its currently-held (e.g., AM) stations in order to buy (but not be required to bifurcate) an FM station.

223/ In theory, as many as six Free Speech Stations could fit on a single channel. Thus, again in theory, a platform owner could be allowed to bifurcate one channel seven ways (six Free Speech Stations and one (midnight to 6 AM) Entertainment Station), then buy six more stations on condition it bifurcate one of them seven ways. This would yield twelve Free Speech Stations (six each on two channels) as well as a platform consisting of twelve Traditional Stations and two night-time only Entertainment Stations. That would deliver considerable viewpoint and source diversity, but by lumping twelve Free Speech stations onto just two channels it could run the risk of marginalizing these stations in the eyes of the public. This scenario might be attractive if each of the two channels being bifurcated were high powered, full service FMs.

224/ See discussion at pp. 158-61 infra.

limits on advertising revenues or listenership.[225/] Nonetheless, we emphasize and cannot say strongly enough, that platform aggregation (Traditional plus Entertainment Stations) must never be allowed to proceed to the point where a platform has so much of the market's advertising revenue and so much of the market's spectrum that no standalone owner can survive and serve audiences capable of supporting a fulltime service.[226/] As we maintain throughout these Comments, the Commission should strive for a balance between platforms and standalones -- and if it adopts this proposal, a balance among platforms, fulltime standalones, and Free Speech Stations.

If Free Speech Radio were created, the public would be the greatest beneficiary. Many stations today offer perhaps one hour per week of scattered, perfunctory and noncontroversial public service spots. But after a 168-hour per week Traditional Licensee bifurcates a channel, a listener could tune to that channel at a specific time and know that she will enjoy news, public affairs, public service or religious programming totaling at least ten hours per week and probably more. If several platform operators undertook channel bifurcations, the public would experience thought provoking, informational and inspirational programming in a quantity and variety reminiscent of the Golden Age of Radio.

225/ See 49-50 supra (preferring bright-line rules over case-by-case review).

226/ See Platform Size and Program Formats, supra, at 22.

wireless -- and allowed small firms to prosper through bifurcation of key attributes of a license -- geography and spectrum.230/

To be sure, there has been one very well-intentioned structural initiative that failed because it contained insufficient incentives to bring about any material restructuring of broadcast ownership.231/ Thus, the key threshold question is whether the

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230/ In 1996, the Commission proposed to allow PCS licensees to carve out smaller, more affordable commercial mobile radio licenses through geographic partitioning and spectrum disaggregation. Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers (Report and Order and Further Notice of Proposed Rulemaking), 11 FCC Rcd 21831 (1996), recon. denied, 15 FCC Rcd 8726 (2000). The Commission's decision -- with Section 257 in its very caption -- concluded that its new rules would "eliminate barriers to entry for small businesses seeking to enter the PCS marketplace and [] promote the rapid creation of a competitive market for the provision of PCS services." Id. at 21882 ¶114. The Commission followed this approach in six subsequent proceedings that also proposed spectrum partitioning and disaggregation. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service (Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking), 13 FCC Rcd 19064, 19092-93 ¶52 (1998); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band (Second Report and Order), 12 FCC Rcd 19079, 19129-35 ¶¶142-159 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands (Report and Order and Second Notice of Proposed Rulemaking), 12 FCC Rcd 18600, 18669 ¶168 (1997); Amendment of the Commission's Rules Concerning Maritime Communications (Second Report and Order and Second Further Notice of Proposed Rulemaking), 12 FCC Rcd 16949, 16995-97 ¶¶91-95 (1997); Amendment of the Commission's Rules Regarding Multiple Address Systems (Notice of Proposed Rulemaking), 12 FCC Rcd 7973 7987 ¶27 (1997), rules adopted in Amendment of the Commission's Rules Regarding Multiple Address Systems (Report and Order), 15 FCC Rcd 11956, 11982 ¶68 (2000); Paging Systems Second Report, 12 FCC Rcd at 2806 ¶168.

231/ We refer to the Mickey Leland Rule, which between 1985 and 1992 permitted the owner of twelve AM, FM or TV stations nationwide to hold a minority interest in two more stations in each service if the majority interests were held by racial minorities. Only four companies took advantage of the rule. See discussion at pp. 64-65 supra.

Free Speech Radio concept as we present it here embodies a sufficient incentive for bifurcation.

The mathematics of a bifurcation incentive is fairly straightforward. An economically rational Traditional Broadcaster would be likely to elect bifurcation if the income received from the "sale" of 20 hours per week of airtime, plus the value of the opportunities for platform growth and further program deregulation, together exceed the transaction cost of bifurcating, plus the foregone advertising revenues from the bifurcated 20 hours per week, plus the additional (albeit slight) loss of whatever competitive edge attaches to the ability to hold oneself out to the public as a 168-hour service rather than a 148-hour service. Put rigorously, suppose:

PS: price paid by Free Speech Broadcaster for the 20-hour station

VP: added value to platform operator attendant to the ability to have a larger platform as a result of bifurcation

VR: added value to platform operator attendant to the ability to have Entertainment Station operate with less program regulation

TC: transaction cost of bifurcating, including promotion charges and legal fees

NPS: net present value of advertising sales the Traditional Broadcaster would have received for spots in the 20-hour bloc

FCP: "Fulltime Convenience Premium" -- the premium in station value attendant to being able to hold out to listeners and advertisers that one's station delivers a particular type of programming during every hour of the week.

Thus, bifurcation is attractive to a platform owner if:

$$(PS + VP + VR) > (TC + NPS + FCP).$$

In an active market for broadcast transaction, PS and NPS should almost cancel each other out. The market for radio spectrum remains strong enough to permit sellers to find buyers willing to provide fair compensation for the assets being sold. Furthermore, TC should be manageable if the Commission keeps the rules relatively uncomplicated.

The Fulltime Convenience Premium associated with offering only 148 rather than 168 hours a week of format-specific programming is probably very slight, especially if listeners have clear notice of which 20 hours are devoted to another purpose Advertising sales rates for a 148-hour operation would probably be little different from the rates a 168-hour operation could command. Listeners desiring only entertainment from their radio listening experience are sophisticated enough to tune out during times when nonentertainment content is offered, as long as such offerings occur in predictable and definable blocks. Radio listeners are clever enough to discern when their music might briefly take a vacation. Radio listeners are the same Americans who listen to television and use the Internet. Almost every television station broadcasts many "formats"; viewers adjust by changing channels several times a night. Cable channels, defined by their dominant formats, sometimes broadcast completely different formats (e.g., infomercials) in certain time slots without suffering a noticeable loss of their core audiences. Internet users change websites several times an hour; indeed, radio listeners themselves change channels during excessive advertising "clutter", but inevitably they return.

Radio listeners are bright enough to figure this out. They will adjust to a channel occupied by a "daytime" station and an "evening station", or to one occupied by a "weekday station and a weekend station." Thus, FCP, while significant, is not so overwhelming a number that incentives cannot be devised that would overcome its influence. Consequently, VR and VP can be designed so that their combined value far exceeds FCP.

As noted above, VR is the value to a licensee of having the ability to broadcast almost anything it chooses, including almost 100% music or advertising. That paradigm would apply to Entertainment Stations. Since each bifurcation of a station in an existing platform creates two Free Speech Stations, there is little reason to also require an Entertainment Station to do much more than entertain. It would have a bedrock obligation to serve community needs, but there is no reason for an Entertainment Station to have an issues/programs list or to have nonengineering obligations apart from EEO, Section 315 and the indecency rules.

To be sure, a licensee might not save much money by being freed of such feeble obligations as the issues-programs list.232/ Still, some economic value to the owner of an Entertainment Station may derive from the slightly greater assuredness of license

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232/ For example, about eight staff hours are required to prepare four quarterly issues/programs lists, for a cost of perhaps $100 - $200 per year. The cost of airing the issue-responsive programming is virtually zero, since the underlying regulation allows for non-local PSAs. The PSAs are available for free (or, sometimes, broadcasters can even charge for them) and they can be inserted into the schedule wherever unsold ad avails appear. Obviously, many stations spend much more than a couple hundred dollars a year meeting community needs, but they are not required to spend more.

renewal, inasmuch as there would be few causes of action that could give rise to a legitimate challenge. Nonetheless, this approach is worth considering even if it only helps bring a few Free Speech Stations into being.233/

The far more significant factor that could incentivize bifurcation is VP -- the added value to the platform operator in being able to enlarge its platform.

A threshold policy question is how many stations would have to be bifurcated in exchange for allowing a platform operator to acquire most of the airtime on additional channels in a market. If the company had to bifurcate all of its stations just to get one additional 148-hour facility, it would wind up with fewer total hours per week (nine times 148 is 1,332 hours, while eight times 168 is 1,344 hours). That would actually disincentive bifurcation. However, if the platform operator could obtain a ninth (148-hour) station just by bifurcating that one channel, the public might not gain an additional voice because the addition of the Free Speech Station would be offset by the loss of the voice formerly represented by the ninth station under independent ownership.

233/ It could be argued that if an Entertainment Station is not obligated to provide any public service, it should no longer be counted as a voice for the purpose of evaluating diversity of viewpoints. That argument has some force, but the argument to contrary is that the issues/programs list, and a few PSAs per week, do not make a station a voice, any more than going through airplane screening makes one a safe passenger. The issues/programs list is only the means to an end, and not a very good means at that. The potential use of the airwaves -- whether that use materializes without specific federal requirements or with only ephemeral ones -- is what makes a radio station a voice. An Entertainment Station would be a voice because it would still carry a bedrock obligation to serve community needs, and because it would still be subject to Section 315.

Our approach would allow a platform operator to acquire (up to antitrust or public interest competition limits) one additional 148-hour station for each preexisting station it bifurcates. Thus, a company with eight 168-hour stations could operate seven 168-hour stations and two 148-hour stations; or six 168-hour stations and three 148-hour stations, and so forth. At the outside, the company could operate sixteen 148-hour stations if (a big "if") in doing so it would not come to control so much advertising revenue and spectrum that fulltime standalones could not survive and serve audiences capable of supporting a fulltime service.234/ Here is what a growing platform would look like, and what its contribution to the number of stations in the market would look like, for a platform owner that elects sequential bifurcations of each of its original eight stations.

TABLE 1

METAMORPHOSIS OF AN EIGHT STATION PLATFORM UNDER BIFURCATION

Number of Bifurcation Elections	Number of Traditional Stations (168 hrs/wk)	Number of Entertainment Stations (148 hrs/wk)	Platform Size (sum of Traditional and Entertainment Stations)	Number of Free Speech Stations (20 hrs/wk)	Number of Stations Using Platform's Channels
0	8	0	8	0	8
1	7	2	9	2	11
2	6	4	10	4	14
3	5	6	11	6	17
4	4	8	12	8	20
5	3	10	13	10	23
6	2	12	14	12	26
7	1	14	15	14	29
8	0	16	16	16	32

234/ See p. 122 supra.

The numbers in the right-hand column demonstrate how the public benefits as platforms grow under the Free Speech Radio concept. A licensee that metamorphoses from eight 168-hour/week stations to sixteen 148-hour/week stations would create sixteen new Free Speech licensees -- sixteen new, independent voices, each broadcasting at least ten hours per week of issue-responsive programming. That should more than offset the loss of viewpoints aired by the stations by the platform owner. If a broadcaster delivers to the public this huge net gift of free speech, it deserves an opportunity to reach more listeners by acquiring additional entertainment outlets.

This leads to the ultimate question in any analysis of a proposed rule: at the end of the day, would the public be better off? The answer is yes -- unquestionably. Today, a multi-station broadcaster in a 30-station, 10-licensee market might control eight stations that account for 30% of the market's revenues. Suppose that an Entertainment Licensee (subject to antitrust limits) chose to operate with two 168-hour stations, and in exchange for bifurcating six of its original eight stations it were permitted to have the 148-hour bifurcated portion of an additional six channels. Thus, 12 Free Speech Stations would be created. Assume that after bifurcation, the platform owner could sell 10 spots per hour at an average of $50/spot during the 148 hours it would control, and that the twelve Free Speech Stations with which the platform owner shares channels would each realize $20/spot during the 20 hours they would each control. Further, assume that the spot rates for a nonbifurcated (168 hour) station are $55/spot and $22/spot for the

comparable time periods, with the higher rates reflecting a 10% "Format Convenience Premium" (a much higher percentage than in real life). For this analysis, we assume a conservative scenario: the six stations added to the platform had been three AM-FM duopolies, so that three licensees were lost while twelve new Free Speech licensees were gained. Finally, we generously assume that (1) each 168 hour per week station was devoting two hours per week to nonentertainment programming; (2) a 148 hour per week Entertainment Station would devote only 30 minutes per week to nonentertainment programming, and (3) a Free Speech Station would devote only its minimum-permissible 10 hours per week to nonentertainment programming.

Under these assumptions, here is how this scenario might look.

TABLE 2

POTENTIAL ECONOMIC CONSEQUENCES OF A BIFURCATION SCENARIO

	Pre-Bifurcation (8 stations, ea. 168 hours/week)	Post-Bifurcation (14 stations, 2 with 168 hours/ week and 12 with 148 hours/week)
Number of commercial channels in market	30	30
Platform's number of 168 hr./week stns.	8	2
Platform's number of 148 hr./week stns.	0	12
Number of Free Speech (20 hr./week) stns.	0	12
Number of other (168 hr./week) Stns.	24	18
Number of stations in market	30	42
Number of voices in market	10	19
Total hours for all stns. on air/week	5,074	5,074
Total hours nonentertainment (all stns.)	60	155
Total ad dollars in market/year	$118,976,000	$118,976,000
Platform's hours on air/week	1,344	2,072
Platform's spot revenue/week	$686,400	$1,059,600
Platform's spot revenue/year	$35,692,800	$55,099,200
Platform's % of market's airtime	26.7%	41.2%
Platform's % of market's ad dollars	30.0%	46.3%
Each Free Speech Stn's hours on air/week	0	20
12 Free Speech Stns' total hours on air/week	0	240
Each Free Speech Stn's spot revenue/week	0	$4,000
12 Free Speech Stns' total spot revenue/week	0	$48,000
Each Free Speech Stn's spot revenue/year	0	$208,000
12 Free Speech Stns' total spot revenue/year	0	$2,496,000
Each Free Speech Stn's % of market's airtime	0	0.4%
12 Free Speech Stns' % of market's airtime	0	4.7%
Each Free Speech Stn's % of market's ad dollars	0	0.2%
12 Free Speech Stns' % of market's ad dollars	0	2.1%

Several tentative conclusions emerge from this table. This single bifurcation election of one company to change from an eight fulltime station platform into a platform of two fulltime stations and eight 148-hour stations would produce the following:

- The market would be transformed from 30 stations/ten voices to 42 stations/19 voices -- almost doubling viewpoint diversity and almost restoring the market to pre-1992 diversity levels.

- The total amount of nonentertainment programming in the market would nearly triple, from 60 to 155 hours.

- The platform would still not control enough ad dollars to trigger DOJ scrutiny or an FCC red flag.

- The platform would realize a 54.4% gain in annual revenue (nearly $20 million), easily enough to incentivize the bifurcation.

- Each Free Speech Station would earn more than enough from its own ad sales to realize a profit from the operation of a 20 hour per week facility.

Tension could arise between large platforms and Free Speech Radio if the platforms attempted to dominate radio advertising and thus prevent Free Speech Radio from garnering a sufficient share. Such an effort would fail. Advertisers cannot easily buy around a niche format, nor would a platform find it economically viable to sacrifice a fulltime or nearly fulltime signal to duplicate a Free Speech Station's niche format.235/ Consequently, a Free Speech Station -- particularly if it is the only station in its niche -- would garner a steady and secure share of advertising revenue irrespective of what the platform operator could gather up with its mainstream formats and their hybrids. Prudent advertisers would buy a platform and then also buy the Free Speech Stations in order to secure 100% market coverage -- an achievement impossible today because there are so few niche formats being broadcast. In this

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235/ See Platform Size and Program Formats, supra, p. 21.

way, the presence of Free Speech Radio would allow the radio stations in a community -- for the first time -- to compete head to head with newspaper and television stations in offering advertisers 100% market coverage.

Consequently, the Free Speech Radio concept would provide substantial benefits to the public -- and the concept is economically attractive and sustainable. Large, small, majority and minority owned broadcasters, advertisers, people working in radio, and the listening public would all be better off.

The Free Speech Radio Concept is a moderate and largely deregulatory initiative. By using incentives to business aimed at correcting a capital-diminishing structural anomaly (the Format Imperative), the Free Speech Radio Concept would produce a stronger market that attracts more capital, more competitors and stronger competitors, more diversity and more public service. Those who love radio should endeavor to find common ground on the design and details of such a plan.

B. The Public Interest Benefits Of Channel Bifurcation

We present here the public interest case for channel bifurcation. At the outset, we note that channel bifurcation can be performed pursuant to Section 202(b)(2) of the Act without the need to change the ownership cap above that reflected in Section 202(b)(1).[236/] However, last month the D.C. Circuit issued a decision which, if it attains finality, essentially confirms that the Commission may raise the ownership cap on its own without Congressional authorization.[237/]

Nonetheless, just because the Commission may be permitted to raise the ownership cap does not mean that it should do so. If the Commission simply raised the ownership cap, few licensees would go to the trouble of bifurcation. The public might receive the benefits of greater economic efficiency (offset somewhat by the consequences of a reduction in broadcast employment) as well as more hybrid format variety in mainstream formats. But the public would lose the opportunity, otherwise available through a strategy of bifurcation, to receive more competition, viewpoint diversity, source diversity and minority ownership. Those and other benefits of channel bifurcation are detailed below.

236/ See pp. 158-161 infra.

237/ See Fox Television, supra, 2002 U.S. App. LEXIS 2575 at p. 33 (suggesting that Section 202(h), which requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest," would have no meaning if the Commission could not adjust ownership limitations on its own.)

1. Channel Bifurcation Would Expand Viewpoint And Source Diversity

a. Scores Of New Voices Of All Types Would Have Ownership-Level Access To The Airwaves

The most dramatic advantage of Free Speech Radio is its potential to expand the range of viewpoints available to the public and the range of sources transmitting these viewpoints. This objective is highly favored under First Amendment principles.238/ As the Supreme Court has said, "speech concerning public affairs is more than self-expression; it is the essence of self-government."239/

In many contexts, the Commission desires broadcasters to speak rather than entertain. Its Children's Television regulations, Section 315, its pre-Deregulation of Radio programming regulations and (notwithstanding its feebleness) the issues/programs list are constitutionally noncontroversial examples of FCC expectations that a broadcaster's speech contain thoughts. In some contexts (e.g., its nonorigination requirement for translators), the Commission even acts in a content-neutral manner to discourage speech. As long as the Commission does not regulate what is said, it may act to ensure that something is said.

The availability of bifurcation would actually reduce the already modest range of indirect FCC regulation of speech. Presently, every broadcaster must air some nonentertainment programming as a condition of having the privilege of holding a

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238/ See Associated Press, supra, 326 U.S. at 20.

239/ Garrison v. Louisiana, supra, 379 U.S. 64, 74-75 (1964).

license. Those wishing to be broadcasters have no other options. But if bifurcation were permitted, anyone who is or aspires to be a broadcaster would have three options:

(a) be a Traditional Broadcaster and accept some bedrock obligation to provide nonentertainment programming; or

(b) be a Free Speech Licensee and accept the responsibility of using the majority of one's airtime to provide nonentertainment programming; or

(c) be an Entertainment Licensee and broadcast some, or almost no nonentertainment programming.

Thus, the Free Speech Radio concept would provide more First Amendment flexibility for individual broadcasters. At the same time, the bifurcation option would result in substantially greater viewpoint and source diversity for the public. As noted earlier, if in a typical medium sized market one company bifurcated six of its eight stations and then exercised its right to buy and bifurcate six more, the number of voices in the market would almost double and the amount of nonentertainment programming available to listeners would probably almost triple.240/ These would be profoundly significant public interest gains.

In addition to providing the public with more listening choices, Free Speech Licensees would promote viewpoint diversity by offering those engaged in radio content creation more workplaces at which to practice and hone their craft. Furthermore, those working in Free Speech Radio would learn how to produce commercially attractive nonentertainment programming. Many Free Speech Radio professionals would take this knowledge to Traditional Stations and

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240/ See pp. 132-34 and Table 2 supra.

Entertainment Stations, where they would enhance the likelihood that Traditional Stations and Entertainment Stations would also produce commercially successful nonentertainment programming.

b. Radio News, Public Affairs, Public Service, Political and Inspirational Programming Could Recover Their Strength

When it has considered expanding the number of broadcast stations, the Commission has recognized that one of its "basic objective[s]" is to provide "outlets for local expression addressing each community's needs and interests.")241/ During the Golden Age of Radio, before format narrowcasting and before television, broadcasters had strong economic incentives to maximize public service. Although those incentives are largely gone, the public today is far better educated that it was two generations ago, and thus the public is better prepared to understand and appreciate the discussion of issues over the air. The success of television news magazines and of television news channels demonstrates the public's hunger for information. Thought provoking, informative and inspirational programming on radio have

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241/ See, e.g., Modification of FM Rules (Docket 80-90), 94 FCC2d at 158. See also Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). See also Low Power Television (R&O), 51 RR2d 476, 525 (1982) (Separate Statement of Chairman Fowler and Commissioner Dawson) ("[l]ow power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.")

been diminished by a market anomaly (the Format Imperative), not by low public demand or by any venality on the part of broadcasters. Structural incentives for bifurcation could do much to restore respect for radio's power to inform, illuminate and inspire as well as entertain.

c. Unprecedented New Opportunities For Religious Broadcasting Would Become Available

The Commission would be on shaky constitutional ground if it either preferred or disincentivized religious programming. Before Deregulation of Radio, the Commission struck a fair balance by including religious programming in its definition of nonentertainment programming, which also included news, public affairs and public service. That category was also broad enough to include content produced by nonbelievers; thus, it did not stray from the Establishment or Free Exercise clauses.242/

Religious broadcasters must to meet the spiritual needs of a far wider cross-section of faiths, denominations, religious traditions and language groups than ever before. The religious community and its language, cultural and theological diversity are growing, but the broadcast spectrum is virtually exhausted. Although about 40% of LPFM applicants are religious broadcasters,

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242/ See Deregulation of Radio, supra, 84 FCC2d at 973 ¶13 (reconfirming that religious programming "can be counted towards meeting the non-entertainment programming guideline.") Our references in these Comments to "religious broadcasting" are slightly awkward shorthand: we mean to include content that expresses the views of humanists, atheists, agnostics and freethinkers, i.e., those who sincerely do not believe that religious faith necessarily defines our place in the universe.

LPFM cannot possibly accommodate even a fraction of the unsatisfied demand for outlets for religious broadcasting.

The cost of purchasing and operating a full power station in a major market is prohibitive for churches; indeed, as we have documented, religious broadcasters tend not own stations in the largest markets.243/ Furthermore, platforms tend not to place stations in religious formats.244/

When they attempt to buy time on other stations, churches often experience difficulty. Frequently, a religious group prefers with good reason not to buy Sunday morning time from the handful of stations that time-broker; often, the group is dissatisfied by the aural environment -- frequently a long block of seriatim half-hours of varied programs of inconsistent technical quality, which are necessarily always subject to cancellation by the licensee. While a few religious broadcasters have become quite successful, they seldom would (nor should they be expected to) devote airtime to denominations with which they have religious disagreements.

The availability of several new stations with just enough airtime to meet the needs of a single denomination (or a group of like-minded denominations) would expand the range of religious expression throughout the country by easing the capital requirements that impede the ability of those who wish to speak spiritually to take to the airwaves. The opportunity to be a Free Speech Licensee would open the airwaves to a wide variety of

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243/ See Platform Size and Program Formats, supra, p. 11 and Chart 4.

244/ Id., pp. 18-19.

religious traditions for the first time. Moreover, the programming requirements for Free Speech Radio would impose no burden on religion at all, since, as noted above, religion has correctly been classified as nonentertainment programming since before Deregulation of Radio.

d. Noncommercial Speech Would Find Much-Needed New Outlets

A Free Speech Station would be reasonably priced compared to the cost of a fulltime station. With station prices going through the roof, and new full power facilities available (if at all) only through auctions, Free Speech Stations would be a route to station licensure available to a wide variety of everyday citizens who speak through nonprofit organizations.

Like religious broadcasters, most nonprofits lack the resources to purchase a fulltime station. Moreover, the needs addressed by most nonprofits are specialized, necessitating niche formats that might not generate sufficient advertising to support a fulltime station. The noncommercial reserved band is full in most major cities, and noncommercial licensees are often prohibited by the terms of their governing charters from being time brokers. Bifurcation would offer a partial solution to these difficulties by permitting nonprofits to provide specialized services to audiences with intense demand.245/

245/ We have proposed that Free Speech Station ownership should be limited to one to a customer per market. See pp. 166-67 supra. A good case can be made for an exception to this requirement for incumbent noncommercial licensees with grandfathered Class D facilities, since the coverage areas of these facilities are inadequate for full market dissemination of their viewpoints. The same good case for a exception can be made for LPFM operators.

e. Language Minorities Would Have Access To The Airwaves

Share-times came into widespread use two generations ago as a means of serving populations for whom Polish, Italian, Russian and Yiddish (and later Spanish) were the primary and often the only languages used in the home. Typically, in major cities these language groups did not have sufficient size to support a fulltime station, but the language group had sufficient size and intensity of demand to support a parttime station. Time brokerage has largely replaced share times, but in many markets no stations are willing to adopt a time brokered format, or there is no time available on the few stations with this format. Furthermore, since the licensee has ultimate program control, an arbitrary decision by a station owner can entirely cut off all radio programming in the primary language of a large segment of the community.

Today, new language minorities are developing in major cities, in numbers that are more than sufficient to support a radio station. But the spectrum is crowded now, and Asian Americans, in particular, still face discriminatory entry barriers precluding their full participation in broadcasting.246/

246/ See Platform Size and Program Formats, supra, at 19-20 (calling attention to the "virtual absence of format adoption or even nonformat programming in Asian languages -- particularly Chinese and Vietnamese -- notwithstanding the huge populations for which these are the primary languages," which "contrasts starkly with the representation of programming serving other language groups with the same or smaller numbers of primary speakers....for example, over 750,000 primary Chinese speakers were offered format or nonformat special programming by no more than eleven stations from 1991-2001, while about 1/3 as many primary Polish speakers were offered format or nonformat special programming by at least 145 stations -- thirteen times as much service, a disparity that is probably even greater today.")

As a result, many members of these communities lack interconnectedness with the broader society.

Bifurcation could be a partial solution to this problem. It has the advantage of having already been tried successfully, two generations ago. Given the high cost of airtime and the high demand intensity of those desiring programming in specific languages, a 20-hour per week Free Speech Station, broadcasting in a language unduplicated elsewhere on the dial could do quite well. Indeed, such a station might choose to split its own time into brokered or non-brokered ten hour blocs and thus satisfy intense demand for service in two languages.

2. Channel Bifurcation Would Maximize Format Diversity By Increasing Platform Size And Increasing The Number of Niche-Friendly Independent Outlets

As we have found, platform owners expand diversity among mainstream formats by offering hybrids of certain commercially established program types (e.g., classic rock).[247/] By itself, hybrid formats offer only a modest case for raising the ownership limits. Yet there is another public interest benefit that sometimes may accompany an increase in platform size: the possibility that the platform is large enough to include niche formats. As a platform increases in size, it might surpass the Niche Tipping Point at which it becomes more lucrative to offer a niche format than a hybrid format on an additional station added to

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247/ See Platform Size and Program Formats, supra, p. 21 (concluding that "[t]he adoption of rock hybrid formats by large platforms probably has contributed to the proliferation and variety of rock music programming on the radio.")

the platform. Nonetheless, the Niche Tipping Point is generally greater than eight stations, although it is clearly much lower than 100 stations.248/

In large markets with very diverse populations, a substantial community may have especially high demand for programming in its favored format or language. In such a market, the Niche Tipping Point may be only slightly more than eight stations. Economists should be able to predict the Niche Tipping Point in particular markets.

Suppose the Niche Tipping Point in a particular market is eleven, and suppose further that through bifurcation, a platform of eight Traditional Stations is transformed into a platform that has three Traditional Stations and ten Entertainment Stations. In this example, the platform might likely offer four mainstream formats (stations 1-4), six hybrids (stations 5-10), and three niche formats (stations 11 through 13). Additional niches, too small to support a fulltime service, would likely be served by many of the ten Free Speech Stations created as a result of the bifurcations that gave rise to this platform. This outcome could be desirable in a major market where a large platform would not present anticompetitive concerns and threaten the healthy balance among platforms and standalone stations. After several bifurcations, the market would provide optimal service to the audience through a good balance of eight business models:

248/ See pp. 40-41 supra.

1. Traditional Stations in platforms, with mainstream formats

2. Traditional Stations in platforms, with hybrid formats

3. Traditional Stations not in platforms, with mainstream formats

4. Traditional Stations not in platforms, with hybrid formats

5. Traditional Stations not in platforms, with niche formats

6. Free Speech Stations, half of whose programming is nonentertainment, mostly provided through niche formats

7. Entertainment Stations in platforms, mostly with with hybrid formats

8. Entertainment Stations in platforms whose size exceeds the Niche Tipping Point, with niche formats.

Only the first five of these business models are implemented in today's radio environment. Bifurcation always would make the sixth and seventh business models possible. Each of these business models would add substantially to the diversity of programming available to the audience. The eighth of these models -- Entertainment Stations with niche formats -- is also possible under bifurcation if the platform size exceeds the Niche Tipping Point. This business model might deserve a chance in a major market where the Niche Tipping Point is greater than eight stations but less than the platform size that would trigger antitrust concerns.

3. Channel Bifurcation Would Strengthen The Radio Industry And Its Competitiveness

Economic efficiency and growth result when any production input can be manipulated to result in an increase in the number of lines of service, e.g., through partitioning and disaggregation. As noted earlier, this principle has driven the Commission's

administration of wireless spectrum.[249/] Another example is found in a close cousin of the radio industry, the movie theater business. Partitioning of a key resource -- seats -- has virtually rescued that business from ruin. Huge, one-size-fits-all theaters, built on the model of the 19th century European opera house, have been replaced throughout the country by multiplexes consisting of several medium-size auditoriums. For the most part, these multiplexes offer hybrids of popular film genres. However, some of these multiplexes have so many theaters that they exceed the relevant Niche Tipping Point. Consequently, these super-multiplexes commonly offer foreign or independent films, live gospel concerts or community meetings. Bifurcation could offer similar benefits to the radio business by allowing radio to more efficiently target niche audiences, bringing them (and their product purchases) within the radio tent. When a language, religious or minority community is provided no radio service that it finds useful, that community will unenthusiastically accept unsatisfactory substitutes or avoid radio entirely. By expanding the total audience for radio and its enthusiasm for the medium (and thus for the products advertised on the medium) the industry would offer advertisers more choices of programming environments to which the advertisers can narrowcast their appeals. This opportunity for more focused audience segmentation would make the radio industry as a whole more competitive. Even if only a few percentage points of the population avoids or underutilizes radio because of the absence of niche formats, the entry of those persons into the radio tent

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249/ See p. 124 n. 230 supra.

would be financially quite beneficial for radio. Even 1% of a $17.6 billion per year industry[250/] represents real money.

An additional competitive benefit of bifurcation in radio would arise when a platform operator reaches or exceeds the Niche Tipping Point. At that point, the platform operator would be programming virtually every commercially attractive hybrid format on one of its stations, and offering niches. This virtually 100% coverage of market would, for the first time, allow a radio owner to compete head-to-head with other media which offer advertisers one-stop, full mainstream market coverage -- network television affiliates and daily newspapers.

As noted earlier, radio serves the public in irreproducible ways, and thus it should be regarded as a market unto itself for competitive purposes, rather than as a mere subset of a media market.[251/] Nonetheless, a platform that achieves universal mainstream format coverage, while still competing within the radio market, would also begin to draw advertising dollars previously expended in other markets. Competition across industry lines is especially desirable, particularly when those other industries are themselves growing more concentrated.

Channel bifurcation would also strengthen the radio industry by increasing the number of radio employers. As noted earlier, consolidation has left many radio employees with nowhere else in

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250/ See Broadcasting & Cable Yearbook 2001, p. xxx (reporting 1999 radio industry advertising sales).

251/ See pp. 47-48 supra.

their communities to seek employment if they lose their jobs.[252/] Free Speech Stations would offer many new career opportunities for displaced, talented radio employees. Furthermore, because Free Speech Stations are likely to be more labor intensive than Traditional Stations or Entertainment Stations, channel bifurcation would help increase the number of employers and the number of jobs in radio. This infusion of employers and jobs would enable the radio industry to attract a continuing stream of creative, highly motivated people. It would also help stem radio's talent drain and remove the specter of race and gender resegregation that derives from the practice of "last hired, first fired" in an industry with a shrinking supply of jobs.

Finally, as described further below, by permitting the Commission to foster the entry and retention of minorities into broadcast ownership, bifurcation would help eliminate an artificial restriction on the pool of talent and creativity that the industry needs in order to stay competitive.

4. Channel Bifurcation's Greatest Advantage Would Be Its Potential To Foster Minority Ownership

a. The Number, Influence And Growth Potential Of Minority Broadcast Owners Would Increase Dramatically

A signature goal of the Commission's minority ownership policies has always been diversity of viewpoints. Measures of success in achieving that goal have been the number of minority owned companies and the number of minority owned stations.

252/ See p. 62 supra.

Lack of access to capital, coupled with station prices which are unattainable for most startup companies, have severely impeded opportunities for minority new entrants. Free Speech Stations would be within the economic reach of those lacking easy access to capital: they would be be the only full power, major market facilities available for a modest investment. Furthermore, since competition to buy these stations initially would be limited to small disadvantaged businesses and by a one to a customer rule,253/ huge companies could not outmaneuver minority new entrants seeking to buy Free Speech Stations. As a result, Free Speech Stations would do much to remedy the consequences of past discrimination.

Bifurcation would leave today's minority owned broadcasters considerably better off than they are now.254/ Today's larger minority owned or controlled companies would be able to enlarge their platforms by bifurcating and becoming Entertainment Licensees. Smaller minority owned companies, struggling because they were unable to bulk up into platforms, would have three survival safety nets as a result of bifurcation.

253/ See pp. 166-67 supra.

254/ Minorities have often had opportunities to purchase stations spun off from large companies that bump against the multiple ownership limits. Large companies taking advantage of bifurcation might briefly have fewer stations to spin off to minorities or anyone else. But that condition would be temporary, since in a few years the large companies taking advantage of bifurcation would inevitably bump up against competition-based ownership limits set by the FCC or DOJ. At that time, spinoffs would once again be available when mergers occur. When that happens, a plethora of new entrepreneurs will have acquired radio ownership experience in the Free Speech Radio arena, and they would then become competitive additions to the pool of candidates to purchase fulltime spinoff stations.

First, a standalone station could bifurcate, raising cash by taking advantage of the market for Free Speech facilities that is likely to develop as platform operators undertake bifurcations.

Second, a standalone station could bifurcate and sell the Entertainment Station portion of the occupied channel -- in effect, turning itself into a Free Speech Licensee.255/ This option would help stations in financial distress to continue in business and, often, to continue serving niche audiences that may be too small to support a fulltime operation.

Third, the standalone station owner could sell its station and reinvest the proceeds in the purchase of a Free Speech Station. The sale price of a fulltime 1,000 watt nondirectional high-band AM standalone in a major market probably would be more than sufficient to cover the cost of a full market Free Speech Station on (e.g.) a Class C3 FM channel. In this way, the standalone operator could both improve its reach and narrow its focus.

These three options could do much to reverse the loss of minority owned companies that we have documented.256/

Another way that bifurcation could stimulate minority ownership is through station incubation. Under this concept, a platform owner that spawns several Free Speech Stations could help the owners of those stations secure financing, learn the business and share costs and experiences. Platform owners might find it

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255/ There is no immediately obvious reason why a company should not be able to buy its way into radio by purchasing and operating Entertainment Stations exclusively. There is nothing inherently anticompetitive or anti-diversity about such a business model.

256/ See Consolidation and Minority Ownership, supra, at p. 11.

attractive to work cooperatively with Free Speech Radio owners to share physical and engineering facilities, on a model of a newspaper JSA. The respective licensees would conserve resources in this way by minimizing redundancy, downtime or duplication of physical resources. This arrangement could further be structured to allow the platform owner to offer on-site training without crossing the line into de facto control. We hope that some of the most respected and socially conscious companies in broadcasting might find it desirable to make Bifurcation Elections and establish incubators.

Proposals for media incubators advanced by NABOB, by MMTC. and by the Commission itself have been pending for a decade.257/ We

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257/ Largely adopting NABOB's model, the Commission sought comment on its own incubator proposal in 1992 Radio Rules - Reconsideration, supra, 7 FCC Rcd at 6391-92 at ¶¶20-26. These proposals are still pending. Owing to their timeliness and quality, we set them out at some length.

> [Our proposal] would permit a group owner to own or have a controlling interest in some number of stations beyond the otherwise applicable national limits if it establishes and successfully implements a broadcast ownership "incubator" program designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio field. Such a program would work as follows. A group owner would be permitted to acquire an attributable interest (including a controlling interest) in stations above the otherwise applicable ownership limit upon a prior demonstration that it has in place a small business investment incentives program involving a meaningful and ongoing commitment to increasing pluralism in radio station ownership and stimulating investment in the radio industry. Such programs would be designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited broadcast business experience, and that have expressed an interest in station ownership.
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(n. 257 continued on p. 152)